STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 23, 1996

VIA FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-150

Gentlemen:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Patrick S. Berdge
Attorney for California

PSB:cdl

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC 96-309
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-150
	)	
Accounting Safeguards Under the Telecommunications Act of 1996	)	
	)	

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING

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August 23, 1996

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I. INTRODUCTION

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") hereby respectfully submit these comments to the Federal Communications Commission ("FCC" or "Commission") on the notice of proposed rulemaking ("NPRM") regarding rules to implement accounting safeguards provisions of §§ 260 and 271 through 276 of the Telecommunications Act of 1996 ("the Act").

These safeguards are intended to both protect subscribers to regulated monopoly services provided by the BOC's, and in some cases, other incumbent local exchange carriers against the risk of being forced to "foot the bill" for the carriers' entry into, or continued participation in, competitive services such as telemessaging, InterLATA telecommunications, alarm monitoring, pay telephones, electronic publishing, and manufacturing. The safeguards are also intended to promote competition in new markets by preventing carriers from using their existing market power in local exchange services to obtain an unfair competitive advantage in those new markets which other carriers seek to enter.

II. ISSUE

A threshold question posed in the NPRM is whether existing accounting safeguards contained in FCC Parts 32 and 64 should be relied upon to achieve the twin goals of protecting subscribers to BOC's and other incumbent local

exchange carriers' regulated telecommunications services against improper cost allocations and competitors against unreasonable discrimination.[1]

III. SUMMARY

In this NPRM, as with CC Docket No. 96-149,[2] the FCC makes tentative conclusions as to its jurisdiction over matters of concern traditionally handled by state jurisdictions, such as intrastate interLATA telecommunications services, intrastate intraLATA and intrastate interLATA information services, as well as cost allocation and accounting safeguard matters.[3]

IV. DISCUSSION

A. Nonstructural Safeguards

Throughout the NPRM the FCC tentatively concludes that its existing affiliate transaction and cost allocation nonstructural safeguards satisfy the requirements of the Act, except where the Act imposes specific additional requirements.[4] These nonstructural safeguards were developed by the FCC to protect interstate ratepayers from bearing the costs and risks of the telephone companies' nonregulated activities and the competitive ventures of their

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[1] NPRM ¶ 11.

[2] The non-accounting safeguards of §§ 272 and 272 of the Communications Act of 1934.

[3] NPRM ¶ 55 at p.27 and ¶¶ 48-50 at p.25..

[4] NPRM ¶¶ 26 and 28.

affiliates.[5] While the FCC has determined that these nonstructural safeguards are appropriate for interstate regulatory purposes, California disputes that they are, in their entirety, appropriate for intrastate regulatory purposes. Further, nothing in the Act preempts the states from imposing specific nonstructural safeguards that may differ from the FCC's safeguards, so long as such safeguards are not inconsistent with the Act or the FCC's regulations.[6]

As stated in California's comments in CC Docket No. 96-149, California questions both that NPRM's and this NPRM's broad interpretation of the FCC's jurisdiction over traditional state concerns such as intrastate interLATA telecommunications services. The tentative conclusions reached in both NPRMs regarding the FCC's jurisdiction to govern intrastate regulation of telecommunications services lacks adequate legal foundation. Similarly, California submits that matters related to accounting and cost allocation for intrastate services are appropriately left to the respective state jurisdictions as long, of course, as those rules do not contradict the spirit and intent of the Act.

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[5] NPRM ¶¶ 28 and 63.

[6] Telecommunications Act of 1996, § 276(c).

California's position in this matter is consistent with § 254(k) of the Act[7] which clearly gives the states the right to establish for intrastate services, any necessary cost allocation rules, accounting safeguards and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services. Had Congress intended a wholesale preemption of states rights to regulate the intrastate operations of local exchange carriers it would have said so in unqualified terms. In the areas of the Act where states are actually preempted, the Act is clear in that preemption.[8] Furthermore, the Act repeatedly states that the FCC does not have the authority to preempt the states, unless such state rules are inconsistent with the Act or prevent the implementation of the Act.[9]

Consequently, California urges the FCC in this rulemaking to recognize the jurisdiction of the states in determining the scope of regulation of all intrastate activities including, but not limited to, intrastate interLATA

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[7] "A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." (§ 254(k))

[8] See e.g., §§ 253(d), 272, etc., of the Act.

[9] See e.g., §§ 251(d)(3), 252(e)(3), 254(f), etc., of the Act.

telecommunications, intrastate interLATA information services, alarm monitoring services, manufacturing, etc.

B. Part 64 Allocation Rules

Regarding the adequacy of present Part 64 cost allocation rules to prevent local exchange ratepayers from bearing the costs and risks of video and audio programming services, California reiterates its position[10] that an in-depth analysis of the technologies used to provide programming services (as well as other new services) should be undertaken to develop an appropriate, comprehensive process for allocating costs between regulated, programming and other nonregulated services.

C. Scope Of California's Jurisdiction

In this NPRM the FCC reiterates its contention that its rules apply to both interstate and intrastate services. California continues to oppose this conclusion for the same reasons contained in its comments in CC Docket No. 96-149.

> The FCC's proposal that its rules apply to both interstate and intrastate services[11] are of the utmost concern to California. This tentative conclusion would effectively nullify Section 2 (b) of the Communications Act of 1934 ("the 1934 Act").[12] (California's Comments in CC Docket No. 96-149 at p. 2.)

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[10] See California's Comments in CC Docket No. 96-112 (Video Programming Services).

[11] CC Docket No. 96-149 NPRM ¶ 21.

[12] Section 152(b) of the 1934 Communications Act.

D. The FCC's Modified Existing Accounting Safeguard Rules Should Not Be the Exclusive Method Of Preventing Improper BOC Cost Allocations And Unreasonable Competitor Discrimination

While California believes that in general the existing accounting safeguards found in Part 32 and Part 64 of the FCC's rules provide a basis to achieve the aims of §§ 260 and 271-276 of the Act, each state should be afforded the flexibility to adopt, modify, or reject in part, these accounting safeguards for intrastate regulatory purposes, so long as the goals and intent of the Act are not compromised. For example, California has adopted much of the FCC's Part 32 Uniform System of Accounts and Part 64 Cost Allocation methodologies but has deviated from these rules in the areas of affiliate transaction rules and in requiring service-specific cost allocations.[13] The CPUC's affiliate transaction rules require that non-tariffed services provided by Pacific Bell to its affiliates are to be priced at the higher of fully allocated cost plus 10% or fair market value. Conversely, services provided by an affiliate to Pacific Bell are priced at the lower of fully allocated cost or fair market value. Regarding cost allocations, California requires such allocations to be made on a service-specific basis while the FCC requires that the BOC operations be separated between regulated and non-regulated activities. Service-specific cost allocations provide information related to the profitability of each service offered and insight as to

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[13] 33 CPUC 2d 148-149; see also footnote 35 at p. 252, "We do not adopt the FCC's Part 64 Rule 64.902, 47 Code of Federal Regulations § 64.902, with respect to affiliate transactions."

potential cross-subsidies and anti-competitive behavior on the part of the reporting entity. These rules are used to determine the intrastate results of operations for regulatory purposes.

The CPUC firmly believes that its deviations from FCC rules are appropriate for California regulatory purposes. Further, California strongly urges that such determinations should be left to the respective state jurisdictions. In so doing, the FCC will ensure that the spirit and intent of the Act will not be compromised.

E. The FCC's Part 64 Cost Allocation Rules Provide an Adequate Starting Point For the Protection Of Telephone Exchange Service Ratepayers And Competitors

Consistent with the Act, it is California's policy to protect telephony ratepayers from subsidizing the competitive service offerings of local exchange carriers. One of the methods used by the CPUC is to require service specific cost allocations based on a cost allocation process similar to that contained in Part 64. This process is also used to price nontariffed services to LEC affiliates.

California agrees that the present FCC Part 64 cost allocation rules serve as a good starting point to protect telephone exchange service ratepayers or competitors from a BOC or its affiliate providing video, audio, or other programming services. As stated in its comments to CC Docket No. 96-112,[14] California has had limited experience with the technologies deployed to provide

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[14] Video Programming Services

video programming services. Therefore, California does not have any recommendations at this time as to a final methodology to allocate the costs to provide video, audio, or other programming services. But consistent with its video programming comments, California advances the principle that any cost allocation system must be flexible and adaptable so as to foster the emergence of new technologies and at the same time protect telephone ratepayers from bearing the costs or risks of developing and offering competitive services. The costs of providing services must be assigned to the appropriate class of customers. To achieve this end, California reiterates its suggestion within its video programming comments that an in-depth analysis of the technologies used to provide programming services (as well as other new services) be undertaken to develop an appropriate, comprehensive process for allocating costs between regulated, programming and other nonregulated services.

Finally, California recommends the use of an interim fixed allocator of a minimum of 50% of loop costs to video and nonregulated services, combined with a cap on fixed loop costs at their present level, until such time as a final cost allocation methodology is adopted by the FCC for interstate purposes.

F. Computer Inquiry III And Pay Phone Services Regulation

The NPRM invites comments on whether additional accounting safeguards (over and above Computer Inquiry III safeguards) are necessary to fulfill the intent of §§ 276 (a)(1)a and 276 (b)(1)(C) of the Act which prohibits the

subsidization of BOC pay phone services by exchange or access services.[15] The accounting safeguards in Computer Inquiry III may be adequate but California takes issue with the accounting treatment which places pay phone service "below the line" and arguably removes state jurisdiction over consumer safeguards for pay phones and the establishment of public policy pay phones. As in CC Docket No. 96-149, the CPUC opposes relinquishment of its role in regulating intrastate services (including pay phone service), especially with respect to consumer safeguards for pay phone service. California has existing and efficient programs in place which protect California consumers and provide public policy pay phones throughout the State.

California does not agree that the states should be preempted from regulation of intrastate communications services.[16] There is precedent for differing and concurrent state and federal regulation. For example, California has kept inside wiring as a tariffed offering so that its consumer safeguards are preserved even though the federal cost allocation procedures placed the service "below the line."[17] The same should be true for pay phones. Further, § 276 (a)(2) of the Act mandates that BOCs shall not prefer or discriminate in favor of their pay phone service. California believes that the ability to protect consumers

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[15] NPRM ¶ 58.

[16] NPRM ¶ 61.

[17] See 21 CPUC 2d 454; also see: *Louisiana Public Service Commission v. Federal Communications Commission et al.*, 476 U.S. 355; 106 S. Ct. 1890; 1986 U.S. LEXIS 74; 90 L. Ed. 2d 369; 54 U.S.L.W. 4505.

against this kind of anticompetitive behavior should continue to be vested with the states.

Lastly, the NPRM invites comments on whether incumbent LECs should be required to comply with the same accounting safeguards as the BOCs.[18] California agrees that the incumbent LECs should be treated as BOCs for these purposes but that this treatment should not compromise the states' authority to regulate consumer safeguards and provide public policy pay phones within the incumbent LEC's serving areas.

V. CONCLUSION

For the reasons stated, California urges the FCC not to require blind adherence to its proposed modified cost allocation and affiliate transactions rules. These are matters traditionally within the states' jurisdiction and the states are best qualified to judge the adequacy of these safeguards for their residents. Allowing the states flexibility in addressing these issues is well within both the letter and the spirit of the Act. Each state should be afforded the opportunity to adopt, modify, strengthen or weaken, in certain respects, these accounting

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[18] NPRM ¶ 60.

safeguards for intrastate regulatory purposes, so long as the goals and intent of the Act are not compromised.

Dated: August 23, 1996

Respectfully submitted,

PETER ARTH, JR.
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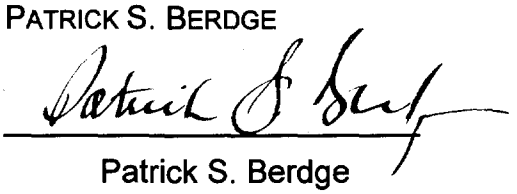
By: 

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CERTIFICATE OF SERVICE

I, Charlene D. Lundy, hereby certify that on this 23rd day of August, 1996, a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in FCC 96-309, CC Docket No. 96-150, was mailed first class, postage prepaid to all known interested parties.

Charlene D. Lundy